

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

LC2014-108226-001 DT

06/25/2015

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT

J. Eaton

Deputy

STATE OF ARIZONA

ANDREA L KEVER

v.

ISRAEL CLASS (001)

JEFFREY D ROSS

NORTH VALLEY JUSTICE COURT  
REMAND DESK-LCA-CCC

RECORD APPEAL RULING / REMAND

**Lower Court Case Number TR 2014–108226.**

Defendant-Appellant Israel Class (Defendant) was convicted in North Valley Justice Court of driving under the influence and driving under the extreme influence. Defendant contends the trial court erred in denying his motion for judgment of acquittal and motion for mistrial. For the following reasons, this Court affirms the judgment and sentence imposed.

**I. FACTUAL BACKGROUND.**

On November 2, 2013, at about 10:40 p.m., DPS Officer (Inaudible) Norris was traveling eastbound on State Route 101 driving a fully-marked police cruiser. (R.T. of Oct. 17, 2014, at 3–5, 8, 74.) He was in the number three lane and driving at 70 miles per hour where the posted speed limit was 65 miles per hour. (*Id.* at 4–5, 11.) A vehicle in the number two lane passed him, and he then paced that vehicle traveling at 80 miles per hour. (*Id.* at 5–7, 59.) He activated his emergency lights, and the vehicle stopped  $\frac{1}{4}$  to  $\frac{1}{2}$  mile later. (*Id.* at 7–8, 43.) He approached the driver, whom he identified as Defendant, and asked him for his driver’s license, registration, and proof of insurance. (*Id.* at 8–9.) At this point, he noticed a blue open beer can in the back seat. (*Id.* at 9–11.) When asked, Defendant admitted he drank “a few beers” at a friend’s house. (*Id.* at 10.) Defendant produced his driver’s license immediately, but it took him about 5 minutes to find his registration and proof of insurance. (*Id.* at 10, 59–60.)

Officer Norris decided to give Defendant a warning for the speed violation, so he had Defendant get out of the vehicle and accompany him to the patrol vehicle. (R.T. of Oct. 17, 2014, at 12.) He noticed Defendant was walking slowly and had to lean against the concrete barrier next to the roadway. (*Id.* at 13.) At that point, Officer Norris noticed Defendant had a strong odor of alcohol

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and glassy watery eyes. (*Id.* at 14–15.) Officer Norris then began a DUI investigation. (*Id.* at 14.) On the following tests, Defendant showed the following number of cues: HGN test, six of six cues; Romberg modified test, four of seven; finger-to-nose, two of eight; finger count, one of four. (*Id.* at 31–37.) Officer Norris said, if a person shows four or more cues on the HGN test, there is a 77 percent chance the BAC is 0.10. (*Id.* at 21.) Defendant’s attorney objected and asked for a mistrial, which the trial court denied. (*Id.* at 21–25.) Officer Norris testified that speeding past a marked patrol vehicle would be a potential sign of impairment. (*Id.* at 75.)

Officer Norris then placed Defendant under Arrest. (R.T. of Oct. 17, 2014, at 38.) During the inventory search of Defendant’s vehicle, Officer Norris found two cans of Michelob Ultra beer, open but empty. (*Id.* at 38, 77.) Officer Norris ultimately took Defendant to the Knutson Station, where his blood was drawn at 1:21 a.m. (*Id.* at 39–41.)

Officer Brandon Hainke testified he drew the sample of Defendant’s blood at 1:21 a.m. (R.T. of Oct. 20, 2014, at 77–80.) Kristen Zwisler testified she analyzed the sample of Defendant’s blood, and the results showed a BAC of 0.177. (*Id.* at 92, 94, 103.) Extrapolating that result showed Defendant’s BAC within 2 hours of driving would have been between 0.183 and 0.196. (*Id.* at 106.)

After this testimony, the State rested. (R.T. of Oct. 20, 2014, at 143.) Defendant’s attorney made a motion for judgment of acquittal, which the trial court denied. (*Id.* at 144–45.) Defendant then presented the testimony of Mark Stoltman. (*Id.* at 146.)

After arguments and instructions, the jurors found Defendant guilty of all charges. On that same day, the trial court imposed sentence. Also on that same day, Defendant filed a timely notice of appeal. This Court has jurisdiction pursuant to ARIZ. CONST. Art. 6, § 16, and A.R.S. § 12–124(A).

II. ISSUES.

A. *Did the trial court abuse its discretion in denying Defendant’s motion for judgment of acquittal.*

Defendant contends the trial court abused its discretion in denying his motion for judgment of acquittal. The trial court should deny a motion for a judgment of acquittal when there is substantial evidence to support a conviction; in determining whether there is substantial evidence, the trial court must determine whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Parker*, 231 Ariz. 391, 296 P.3d 54, ¶ 70 (2013). The trial court may grant a motion for a judgment of acquittal only when there is no substantial evidence to warrant a conviction; thus, when reasonable minds may differ on inferences drawn from the facts, the trial court has no discretion to enter a judgment of acquittal and must instead submit the case to the jurors. *State v. Lee*, 189 Ariz. 590, 603, 944 P.2d 1204, 1217 (1997).

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In the present case, for the (A)(1) charge, Defendant's difficulty in finding his registration and proof of insurance, his walking slowly, and his having to lean against the concrete barrier all showed impairment. This Court would make two observations about a situation where a person is driving on a freeway 15 miles per hour over the posted speed limit and passes a fully-marked patrol vehicle in the next lane: Either (1) the person failed to notice the vehicle in the next lane was a patrol vehicle, which means the person's power of observation was impaired, or (2) the person knew the vehicle in the next lane was a patrol vehicle, but chose to pass it anyway, which means the person's judgment was impaired. Either way, the jurors could find the person was impaired.

For the (A)(2) charges, the State's witness testified Defendant's BAC was 0.177 at the time of the blood draw, which would have been between 0.183 and 0.196 within 2 hours of driving. Defendant did present testimony that questioned the testimony of the State's witness, but Defendant did not present that testimony until after the trial court had denied his motion for judgment of acquittal. Moreover, even if Defendant had presented that testimony before he made his motion for judgment of acquittal, that still would not mean there was no evidence to support the (A)(2) charges. Thus the trial court correctly denied Defendant's motion for judgment of acquittal.

*B. Did the trial court abuse its discretion in denying Defendant's motion for mistrial.*

Defendant contends the trial court abused its discretion in denying his motion for mistrial based on Officer Norris's testimony that there is a 77 percent chance the BAC is 0.10 if a person shows four or more cues. The decision whether to grant a mistrial is within the sound discretion of the trial court, and that decision will not be reversed on appeal unless the conduct at trial is palpably improper and clearly injurious. *State v. Murray*, 184 Ariz. 9, 35, 906 P.2d 542, 568 (1995), *quoting State v. Walton*, 159 Ariz. 571, 581, 769 P.2d 1017, 1027 (1989). In *State v. Superior Court (Blake)*, 149 Ariz. 269, 718 P.2d 171 (1986), the court stated as follows:

We believe that the HGN test satisfies the *Frye* standard. The evidence demonstrates that the following propositions have gained general acceptance in the relevant scientific community: (1) HGN occurs in conjunction with alcohol consumption; (2) its onset and distinctness are correlated to BAC; (3) BAC in excess of .10 percent can be estimated with reasonable accuracy from the combination of the eyes' tracking ability, the angle of onset of nystagmus and the degree of nystagmus at maximum deviation; and (4) officers can be trained to observe these phenomena sufficiently to estimate accurately whether BAC is above or below .10 percent. We therefore hold that, with proper foundation as to the techniques used and the officer's ability to use it, testimony of defendant's nystagmus is admissible on the issue of a defendant's blood alcohol level as would be other field sobriety test results on the question of the accuracy of the chemical analysis.

Our holding *does not mean* that evidence of nystagmus is admissible to prove BAC of .10 percent or more in the absence of a laboratory chemical analysis of blood, breath or urine. . . .

. . . .

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We also hold, therefore, that regardless of the quality and abundance of other evidence, a person may not be convicted of a violation of A.R.S. § 28–692(B) without chemical analysis of blood, breath or urine showing a proscribed blood alcohol content pursuant to title 28, article 5 of the Arizona revised statutes. Similarly, the presumption under A.R.S. § 28–692(E)(3) that a defendant was under the influence of intoxicating liquor in violation of subsection (A) must also rest on chemical “analysis of the defendant’s blood, urine, breath or other bodily substance,” A.R.S. § 28–692(E), as the statute clearly states, and not on a BAC estimate based on nystagmus. Thus, evidence of HGN test results is admissible, as is other evidence in subsection (B) cases, only to corroborate the challenged accuracy of the chemical test results. It is admissible in subsection (A) cases for the same purpose and, also, as evidence that the driver is “under the influence.” It is not admissible in any criminal case as direct independent evidence *to quantify* blood alcohol content.

149 Ariz. 269, 279–80, 718 P.2d 171, 181–82 (citations omitted). This Court concludes the officer’s testimony was within the limits set forth in *Blake*. The trial court therefore properly denied Defendant’s motion for a mistrial.

III. CONCLUSION.

Based on the foregoing, this Court concludes the trial court did not abuse its discretion in denying Defendant’s motion for judgment of acquittal, and did not abuse its discretion in denying Defendant’s motion for mistrial.

**IT IS THEREFORE ORDERED** affirming the judgment and sentence of the North Valley Justice Court.

**IT IS FURTHER ORDERED** remanding this matter to the North Valley Justice Court for all further appropriate proceedings.

**IT IS FURTHER ORDERED** signing this minute entry as a formal Order of the Court.

/s/ Crane McClennen  
THE HON. CRANE MCCLENNEN  
JUDGE OF THE SUPERIOR COURT

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